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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 827

ELEANOR G. MURPHY,

Petitioner,

against

THE CITY OF ASBURY PARK,
a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Eleanor G. Murphy, the petitioner herein, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, reversing a judgment for Twenty-Five Thousand ($25,000.00) Dollars, in favor of the petitioner and against the respondent, for personal injuries caused by the active wrongdoing of the respondent municipality. *Murphy* v. *City of Asbury Park,* 139 Fed. (2nd) 888.

The common law of New Jersey, as enunciated by repeated decisions of its highest courts, declares a municipality is liable in damages for its active wrongdoing. Active wrongdoing has been defined as the wrongful and injurious

exercise of lawful authority, the doing of a lawful act in an unlawful manner, an act of misfeasance. *Allas* v. *Borough of Rumson*, 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648.

Active wrongdoing exists where a municipality, under legislative authority, performs an act but fails to provide adequate protection or make a proper installation. The decision of the Circuit Court of Appeals was predicated upon the ground that the respondent was not subject to liability for its active wrongdoing, because it was protected by statutes which authorized its action. In the District Court, in an opinion based upon the prevailing decisions of New Jersey, District Judge FORMAN had previously denied the motion of the municipality to set aside the verdict, and held that there was evidence of active wrongdoing on the part of the City which warranted submission of its liability to the jury. *Murphy* v. *City of A. P.*, 49 F. Supp. 39 (Appellant—Appendix, 85a). The Circuit Court of Appeals entirely disregarded the common law of New Jersey.

Active wrongdoing is the doing of a lawful act in an unlawful manner. Despite the uniform rule in that jurisdiction that general statutory authority does not bar recovery for private injuries resulting from the creation of a nuisance by a municipality, the Circuit Court of Appeals held that two general statutes absolved the municipality from liability. This decision is contrary to the common law of New Jersey where the cause of action arose, and disregards the principle of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

Statement of the Case

Eleanor G. Murphy on January 20, 1940, received personal injuries when the car in which she was riding collided with a concrete base constructed in the center of Ocean Avenue, a well-travelled street in the City of Asbury Park,

New Jersey. Upon the concrete base was a lighting standard. The driver of the car in which she was riding had turned to the center of the street to avoid another car pulling out from the curb, and struck the base. The driver did not see the base and testified the fixture was not lighted (Appellee—Appendix, 33a, 34a). A county and municipal engineer (Appellant—Appendix, 45a to 53a), and a State highway engineer (Appellant—Appendix, 20a to 35a), declared that the base was improperly placed, and was constructed without protective devices, curbs or islands. Above the base was a standard which was part of the street illumination system (Appellant—Appendix, 39a; Appellee—Appendix, 2a). The City in 1921 enacted an ordinance which directed "that the necessary drains and sewers and standard lamps necessary in connection with the improvements to Ocean Avenue be installed and completed" (Appellant—Appendix, 74a). In 1917 the New Jersey Legislature had passed the Municipalities Act, known as "The Home Rule Act," and at page 410 P. L. 1917, Chapter 152, provided:

> "The Governing body of every municipality shall have power by ordinance to cause the streets and public places of such municipalities to be lighted * * * and to erect and maintain on or under such streets and public places all necessary poles, conduits, wires, fixtures and equipment" (Appellant—Appendix, 84a).

In 1923 a statute was enacted which reads:

> "The governing body of every municipality shall have the power to establish safety zones, to erect, construct and maintain platforms; to erect, construct, maintain and operate standards; beacon lights, guide posts or other structures which in its judgment may be necessary for the safety and convenience of persons and vehicles using the streets in said municipality."

No evidence was presented by the defendant that the structure had been erected as part of a traffic system. The defendant moved, during the trial, for a non-suit and at the close, for a directed verdict, upon the ground that the two statutes authorized the structure and the City was absolved from the consequences of its active wrongdoing (Appellee—Appendix, 6a to 32a).

The District Court denied both motions, holding that the cited statutes were not of such specific, precise and definite character as to authorize obstructions in the highway, and that the City was obligated to refrain from active wrongdoing in the construction and placing of the bases.

After the verdict for the plaintiff, the defendant moved to set aside the judgment and for entry of judgment in its behalf upon the same grounds. District Court Judge Forman, in his opinion, denied the motion and followed the prevailing decisions of New Jersey which hold that a municipality is liable for a nuisance if it improperly constructs an obstruction in the highway, and that it is not absolved from responsibility for its active wrongdoing, by a general statute empowering a municipality to erect a lighting or traffic system (Appellant—Appendix, 85a).

Upon appeal, the Circuit Court of Appeals for the Third Circuit reversed the judgment, holding that the statutes had authorized the structure and legalized what would otherwise have been a nuisance, and hence the City was not liable for its active wrongdoing.

The petitioner now seeks certiorari to reverse that decision.

Jurisdiction

The jurisdiction of this Court to entertain and grant this petition is provided by Section 347 of Title 28 of the U. S. Code. Definitely involved is a decision of the Circuit

Court of Appeals, upon an important question of local law, holding a municipality free from liability for active wrongdoing, contrary to and in conflict with local decisions imposing such liability upon a municipality while acting under statutory authority.

The Questions Presented

The District Court in its opinion dismissing the motion to set aside the verdict and enter judgment in favor of the defendant City, correctly held that whether an obstruction constructed in a public street under a general statute was safely and properly erected was a question for the jury and that the decision of the jury that the City was guilty of active wrongdoing, when the construction was improper, was in accordance with the uniform decisions of the Court of last resort of New Jersey.

The Circuit Court of Appeals in reversing this judgment disregarded the applicable decisions of local law.

The questions presented by this petition are:

1. Is a New Jersey municipality which erects a structure in the center of a public highway, contrary to standard and approved methods, and with no protective devices, liable for active wrongdoing under the controlling decisions of New Jersey?

2. Does the existence of general statutes under which a New Jersey municipality alleges it is authorized to erect an obstruction in the street, absolve it from liability for construction contrary to standard methods and without proper safeguards?

3. Is a municipality of New Jersey liable for the wrongful and improper erection of an obstruction in a public high-

way, and only exempt from liability if the erection of such obstruction is authorized by a specific, precise, exact and definite legislative authority?

Opinions Below

The opinion of District Judge FORMAN denying the motion to set aside the verdict is reported in 49 F. Supp. 39 (Appellant—Appendix, 85a, *et seq.*). The decision is based upon the leading case of *Allas* v. *Borough of Rumson*, 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648, which has been consistently followed in New Jersey. District Judge FORMAN held that the municipality was liable for its active wrongdoing in erecting obstructions in the public highway contrary to standard practice and without proper safeguards. General statutes did not exempt the municipality from liability for improperly erecting what would be otherwise a lawful construction. The District Court Judge clearly distinguished the exception to this general doctrine. An obstruction in the highway which would otherwise be a nuisance may be legalized by precise, definite, exact and specific legislation and, when erected strictly in accordance with the specifications of the legislative enactments, will not impose liability upon the municipality.

The Circuit Court of Appeals in its opinion failed to distinguish between general statutes under which a municipality is always liable for active wrongdoing and those statutes which prescribe definitely, precisely, exactly and specifically the manner in which an obstruction may be erected and thus be legalized. In a prior decision of the Circuit Court of Appeals for the Third Circuit, this distinction was clearly pointed out. In *Delaware, L. & W. R. Co.* v. *Chiara*, 95 F. 2nd 662, the same Circuit Court of Appeals held that where a structure, which was otherwise a

nuisance, was erected in strict accordance with a statute and an ordinance specifying the location and character of the obstruction, the obstruction was legalized.

In its opinion in the case at bar, the Circuit Court of Appeals failed to distinguish between general statutory authority and statutes specifically, precisely, exactly and definitely authorizing a structure which would otherwise be a nuisance.

Reasons Relied on for Allowance of the Writ

1. The Circuit Court of Appeals completely disregarded the well-established common law of New Jersey that a municipality is responsible in damages for its active wrongdoing in performing an act authorized by law.

2. The Circuit Court of Appeals entirely overlooked the local law of New Jersey that the performance of a governmental duty, imposed by legislative enactment upon a municipality, in a wrongful manner, subjects the municipality to liability for the consequences of such wrongful performance.

3. The Circuit Court of Appeals completely ignored its own decision in *Delaware, L. & W. R. Co.* v. *Chiara*, 95 F. 2nd 662, that an obstruction in the highway can be legalized only by specific, definite, exact and precise legislation, but, on the contrary, held that general legislation alone was sufficient to absolve the defendant from liability for an obstruction erected on the highway in an improper manner.

4. The Circuit Court of Appeals entirely overlooked the well-defined distinction laid down in the New Jersey decisions between the wrongful performance of an authorized act and the performance, in a specified manner, of an act authorized by precise, specific, exact and definite authority.

5. The Circuit Court of Appeals has, by this decision, overruled the common law of New Jersey as to municipal liability and has created a conflict between the Federal Courts and the State Courts on the liability of the municipality for its positive acts of misfeasance.

6. The Circuit Court of Appeals either overlooked or failed to apply the law of New Jersey as expressed in *Hammond* v. *County of Monmouth*, 117 N. J. L. 11; 186 Atl. 452, and since consistently followed, that, notwithstanding the authorization by the Legislature of an act, the failure to provide proper protection or to perform the act in a proper manner, is active wrongdoing and positive misfeasance for which the municipality is liable.

7. The Circuit Court of Appeals disregarded the common law of New Jersey as laid down in *Sammak* v. *L. V. R. Co.*, 112 N. J. L. 540; 172 Atl. 60, and *Howard* v. *L. V. R. Co.*, 106 N. J. L. 466; 150 Atl. 356, that the erection of a structure in the highway which would otherwise be a nuisance, can only be legalized by definite, specific, exact and precise legislative authority.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, be granted.

Dated, March 29, 1944.

ELEANOR G. MURPHY,
Petitioner,

By THEODORE D. PARSONS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

POINT I

The City of Asbury Park was guilty of active wrongdoing in the construction of a concrete base, without adequate protection and contrary to the accepted practice, in the center of the traveled portion of the highway.

Public highways in the State of New Jersey are dedicated to the public use. Any obstruction which impedes that use is a nuisance. The case of *Durant* v. *Palmer,* 29 N. J. L. 544, decided in 1862, enunciated that fundamental principle of law which has been repeatedly reiterated. The Court of Errors and Appeals said:

> "The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance. The traveling public have a right to suppose that there is no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it or a suitable railing to protect from it."

This fundamental principle of law has been restated by the same Court in *Fredericks* v. *Dover,* 125 N. J. L. 288; 15 Atl. (2nd) 784. Chancellor CAMPBELL said:

> "The law is well settled that any obstruction or erection in a public highway which interferes with the rights of a person lawfully passing thereon amounts to a common or public nuisance for which

> a municipality is charged with the responsibility if it was an active agent or instrument in the creation of the perilous condition."

The concrete base which was placed in the center of the public highway was, therefore, a nuisance. The traveling public was impeded in its lawful use of the highway. The petitioner, Eleanor G. Murphy, a stranger in the locality and a passenger in an automobile, was directly injured as the result of this obstruction. For such an action a municipality is liable if it has been an active agent in the creation of the perilous condition.

Statutory authorization does not shield a municipality from responsibility for injuries which result from its improper, negligent and wrongful performance of an authorized act. The controlling authority in New Jersey is the decision by the Court of Errors and Appeals in *Allas* v. *Borough of Rumson,* 115 N. J. L. 593; 181 Atl. 175; 102 A. L. R. 648. The Borough of Rumson erected a passageway to its Borough Hall but provided no protective ramp. A non-suit in favor of the defendant was reversed. In holding the Borough liable, the Court said:

> "The wrongdoing here charged is no less than positive misfeasance within the contemplation of our cases. Misfeasance differs from malfeasance or nonfeasance. It has been defined as the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrong."

and, at page 603:

> "There is an obvious distinction between keeping a highway free from nuisances and affirmatively creating one. In the one case it is mere neglect of a public duty for which there is no action for a private injury; in the other there is positive misfeas-

> ance. As was said in *Hart* v. *Freeholders of Union, supra,* 'there is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence.' "

This decision is recognized as the controlling pronouncement of municipal liability in New Jersey for acts of the local government authorized by statute. District Judge FORMAN in his opinion so held (Appellant—Appendix, 96a).

In *Fisher* v. *Nutley,* 120 N. J. L. 290; 199 Atl. 40, the Court of Errors and Appeals held the municipality responsible for placing within the public highway iron pipe, the presence of which resulted in injury to the plaintiff. At page 293, the Court said:

> "In the present case the act of putting the pipe in the road was authorized but the manner was unauthorized, for the defendant was not authorized to place the pipe so that it protruded into the highway set apart for coasting, nor to place it there without warning or barriers."

In *Fredericks* v. *Dover,* 125 N. J. L. 288; 15 Atl. (2nd) 784, the Court of Errors and Appeals affirmed a judgment in favor of the plaintiffs who recovered damages for injuries sustained when the female plaintiff fell because of the improper construction of a metal covering over a storm sewer. Chancellor CAMPBELL, for the Court of Errors and Appeals, said:

> "The law is well settled that any obstruction or erection in a public highway which interferes with the rights of a person lawfully passing thereon amounts to a common or public nuisance for which a municipality is charged with the responsibility if it was an active agent or instrument in the creation of the perilous condition."

District Judge FORMAN in his opinion denying the motion to set aside the verdict followed this definitely settled rule of the common law of New Jersey. Unquestionably, the concrete base in the center of the public highway constituted a nuisance, unless it was properly constructed. Two highway engineers of long experience testified that the manner of construction was improper. This proof was not rebutted. The City was the active instrument in the creation of this obstruction. If the City failed to use care and proper engineering practice in locating and erecting the base in the center of the highway, then under the decisions the City was guilty of active wrongdoing.

In the Appendix to this brief is a list of the cases in which municipalities have been held liable for wrongful acts. Municipalities have been held liable for excavating a hole in the street with no proper protection; for excavating a pavement and installing no guards; for placing an iron pipe in the public street; for placing an excessive amount of oil upon the highway; for installing a sewer cover; for lowering a street grade; for leaving an unguarded traffic standard in the highway; for erecting curbs of improper design; for constructing valley gutters and for excavating sidewalks without guarding the excavation. These various conditions have all been held to create liability upon the municipality in decisions following *Allas* v. *Borough of Rumson, supra.*

In every instance the municipality was acting under a general statute which gave it authority to perform the act in question. Such general statutes did not lessen the duty of the municipality to carefully and prudently perform the work so authorized. If the municipality, in its performance of the authorized work, wrongfully created a hazardous condition from which injury resulted, then for its active wrongdoing, the municipality remains liable. The uncon-

tradicted proof, in the case at bar, showed that a concrete obstruction was placed in the center of the traveled highway and resulted in serious injuries to a passenger in an automobile traveling thereon. The uncontradicted evidence proved that the obstruction had been placed in a wrongful and improper manner and this constituted active wrongdoing on the part of the City and under the common law of the State of New Jersey, the City was liable for the damages which resulted from its wrongful act.

POINT II

The City of Asbury Park cannot avoid liability for the obstruction created by it on a public highway, since there was no specific, definite, exact and precise legislation which legalized the obstruction.

An obstruction may be legalized by specific, definite, exact and precise legislative authority. If such definite, exact and precise authority exists for the creation of the obstruction, then the creator who complies strictly with the terms of such statutory authority is not liable for any injuries that may be caused by the obstruction erected by him. The character of the legislative authority is determinative of the existence of liability. General statutory authority (upon which the Circuit Court of Appeals relied in its opinion) is an insufficient warrant to permit the erection of an obstruction in a public highway with impunity.

The defendant, in the case at bar, relied upon two general statutes of the State of New Jersey which it claimed authorized the erection of the obstruction without resultant liability. The first is Paragraph 1 of Article 24, Chapter 152 of P. L. of N. J. 1917 (Appellant—Appendix, 84a). The latter statute is a general statute and authorizes a

municipality to light its streets and to erect and maintain on or under the streets and public places, necessary poles and equipment. This enabling statute vests New Jersey municipalities with the right of lighting their streets. No specific authority is granted in this statute to obstruct the streets. The statute is equally general with the statutes authorizing municipalities to erect and maintain municipal buildings, to construct, lay out and repair streets, to construct and repair sewers and drainage systems, to construct and repair curbs, to construct and repair sidewalks. All of the statutes authorizing these acts are general. In each instance where the municapility, under such general statutes, performed an act in a wrongful manner the municipality was held liable.

District Judge FORMAN, in his opinion, recognized the requisites of a statute sufficient to legalize an obstruction. The Circuit Court of Appeals did not distinguish between a general statute empowering a municipality to carry on its governmental functions, and statutes of exact, precise and definite terms legalizing obstructions. This distinction is well recognized in New Jersey.

In *Lorentz* v. *Public Service R. Co.*, 103 N. J. L. 104; 134 Atl. 818, the Court of Errors and Appeals held that the legislature may legalize what otherwise may be a nuisance. The elevated structure which caused the injury to the plaintiff had been authorized by a statute which is printed in full in the Appendix to this brief. This statute specifically defined the conditions under which the structure could be erected. It was admitted that the structure was lawfully there under permission of the municipal authorities. The Court of Errors and Appeals said:

> "From what has been said, it should be sufficiently obvious that the structure in question was a lawful one sanctioned by legislative and municipal authority."

The facts in the case *sub judice* are to the contrary. While in the *Lorentz* case, the structure had been erected strictly in accordance with legislative and municipal authority, in the present case, no specific authority appeared.

The Court of Errors and Appeals of New Jersey, shortly after its decision in the *Lorentz* case defined the requirements of a statute legalizing an obstruction in the highway. In *Howard* v. *Lehigh Valley R. Co.*, 106 N. J. L. 466; 150 Atl. 356, the railroad company had erected a concrete crossing signal in the center of a County highway pursuant to a resolution passed by the governing body of the County. A general statute gave the County full control of its highways. Chancellor CAMPBELL distinguished the *Lorentz* case saying:

> "In that case the structure complained of was authorized by a municipal ordinance, for which definite and specific legislative authority existed and it therefore became, as it were, a legalized obstruction in the highway which it was within the power of the legislature to authorize * * * There is, however, another line of cases holding to the contrary where specific legislative authority to permit the obstruction of highways does not exist.
>
> "Several statutes are cited by respondents as clothing the board of freeholders of Somerset county with specific and exact authority to grant the permission to respondents to legally erect and maintain the structures in question. Our examination of these acts brings us to the conclusion that none of them reaches that point."

In *Sammak* v. *Lehigh Valley R. Co.*, 112 N. J. L. 540; 172 Atl. 60, the Court of Errors and Appeals again laid down the same prerequisites to legalize an obstruction in the highway. The railroad company had erected a flasher in the center of the highway, claiming authority under the Public Service Commission Law and by a specific town

ordinance. The railroad company was held liable. The entire case turned upon the question whether the structure was legalized. The Court of Errors and Appeals said:

> "The burden of proof is on the defendant to show that this structure which would otherwise be a nuisance was a 'legalized' obstruction. This it failed to do.
>
> "The instant case is on all fours with *Howard* v. *Lehigh Valley Railroad Co., supra,* where this court held that permission for the erection of a structure identical with this one, granted by the board of chosen freeholders of the county did not legalize the obstacle, but that there must be specific legislative authority to permit the obstruction of highways. There was in that case no statute clothing the board of freeholders with specific and exact authority to grant the permission to the railroad to legally erect and maintain the structure in question.
>
> "And so in the instant case, there is an absence of definite and legislative authority for the erection of this concrete tower in the public highway of the village of Waverly, even for the purpose of placing a signal or sign post thereon, and its presence there, without lights, endangered ordinary travel by night and constituted it a nuisance; and the defendant was properly held responsible for the damage accruing to plaintiff whose car, without any negligence on the part of the driver thereof, collided with said tower."

It is to be remembered that in the *Lorentz* case, there was definite, specific and exact authority to erect the elevated railway and it was admitted that the railway was erected in accordance with this authority and complied with the conditions precedent. The *Howard* and *Sammak* cases both declare that an obstruction in the highway is erected at the peril of the creator unless there is specific, exact, and definite legislative authority. This distinction

was well recognized by this same Circuit Court of Appeals in *Delaware, L. & W. R. Co.* v. *Chiara,* 95 F. 2nd 663. The railroad company submitted to Jersey City plans and blue prints to build a bridge across the highway. The New Jersey statutes authorizing this permission are set forth in the opinion and established many conditions precedent. Under the authority of this statute, the railroad company then submitted to Jersey City blue prints of the proposed bridge and Jersey City passed an ordinance authorizing the bridge and defining with particularity the location of the columns. In the construction of this bridge, the railroad varied the design from the design required in the ordinance and thereafter secured the passage of an ordinance ratifying the altered construction. Judge Biggs, in his opinion, discusses the *Lorentz, Howard* and *Sammak* cases and found that there was specific statutory authority to legalize the obstruction, saying:

> "A literal interpretation of the language of the statute just quoted makes it apparent that a municipality may authorize or legalize the location of a railroad bridge within the wagonway of a public street or highroad in a position which, unauthorized, would constitute a nuisance. It is true, however, that the right of the municipality to grant the authority to erect such a structure is limited by the terms of section 30 to the end that greater safety may be secured to persons or property, or to the end that the construction and maintenance of other than grade crossings may be facilitated or for the purpose of providing for increased or improved terminal facilities and transportation service. In the case at bar, in our opinion, the crossing of Henderson street by the appellant is within the purposes set forth by the Legislature in the act. The grant to the appellant to cross Henderson street in the manner prescribed by the ratifying ordinance of March 6, 1934, by the municipal authorities seems to

> us a proper exercise of the police power vested by the Legislature in the city of Jersey City, and in our opinion there was nothing unconstitutional in the delegation of this police power by the Legislature to the municipality and nothing unreasonable in the manner of its exercise by the city of Jersey City."

Thus the *Howard* and *Sammak* cases in the Court of Errors and Appeals of New Jersey and the *Chiara* case in the Circuit Court of Appeals for the Third Circuit, establish the rule that an obstruction in the highway can only be legalized by definite, exact and precise legislative authority.

A municipal corporation is a creature of statutory law. It finds its power to function in general statutes. All the numerous cases set forth in the Appendix involve acts performed by the municipality under authority conferred by general statutes.

Here, there is no specific, legislative authority or municipal ordinance which authorized the erection of the obstruction involved in the case at bar. The obstruction was not legalized by specific, exact and definite legislation. The City of Asbury Park is therefore liable for its active wrongdoing in so placing this obstruction in the highway without adequate safeguards for protection. The Circuit Court of Appeals in this case failed to recognize the distinction it had previously declared in the *Chiara* case.

POINT III

The concrete base was not part of a traffic system.

The Circuit Court of Appeals, in its opinion, said:

> "It is evident that the standard was a part of Asbury Park's lighting and traffic system on Ocean Avenue."

This statement is contrary to the evidence and to the findings of the Trial Judge, District Judge FORMAN, who specifically held that the concrete bases were a part of the lighting system and did not have for their purpose the control and facilitation of traffic in the street (Appellant—Appendix, 94a). A city policeman (Appellee—Appendix, 2a), the Superintendent of Streets of the City of Asbury Park (Appellant—Appendix, 37a) both described the bases as part of the lighting system. Notwithstanding this testimony and the finding of District Court Judge FORMAN, the Circuit Court of Appeals held that the City had constructed the base for traffic control. This holding of the appellate court was a *sine qua non* for its decision which was based upon the general statute of 1923. This Act lacked every requisite prescribed by the decisions of New Jersey to legalize an obstruction in the highway. There is not a scintilla of evidence in the case that this structure was in any way constructed for traffic control. Bearing this fact in mind, the following statement of District Judge FORMAN, in his opinion, is most important:

> "An examination of the act of the legislature submitted as the authority for the city to encroach upon the center of the traveled portion of the highway leads one to the belief that this authorization was given to municipalities for the purpose of permitting the erection and installation of safety devices in the control of traffic. The items named in the statute are of this nature. They are safety aisles, standards commonly called 'silent policemen', beacon lights, guide-posts, and other structures which the municipality may deem necessary for the safety and convenience of persons and vehicles using its streets. The city submits that the clause 'other structures which it may deem necessary for the safety and convenience of persons and vehicles using the streets' is of such a broad nature as to include the concrete

bases which supported lights installed in the center of the length of Ocean Avenue. I cannot agree that the statute contemplated this system of street lighting. The legislation was directed toward those devices which had for their purpose the control and the facilitation of traffic in the street rather than the lighting of the street."

Conclusion

The petitioner, Eleanor G. Murphy, was a traveler upon a public highway of Asbury Park and under the local law of New Jersey was entitled to the use of the whole highway free of any obstruction that would render its use dangerous. When the City of Asbury Park placed this obstruction in the highway it was under the duty to use the proper protection and safeguards so that the traveling public should not be incommoded in its use of the highway.

No specific, precise and exact legislative authority exists to warrant the creation of this obstruction. The burden of proof was on the City to show that the structure was legalized within such limits. It failed to do so. The Circuit Court of Appeals erred in its decision that the obstruction was legalized. The District Judge correctly stated the law. The decision of the Circuit Court of Appeals is contrary to the local law of New Jersey and has deprived the petitioner of a just and fair verdict, all amounting to a denial of due process.

The writ should be granted.

Respectfully submitted,

THEODORE D. PARSONS,
Counsel for Petitioner.

APPENDIX

Schedule I

P. L. 1886, Chapter 97, page 126.

"An Act to enable street car or horse railroad companies to provide better accommodation to the public, by using what is now known as the cable system for motive power on elevated roads.

"BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That any and every street car or horse railroad, or railway company, or railway or railway or railroad company now operating a street railroad by horse power, incorporated under the laws of this state, in order to afford more rapid, safe and comfortable means of transporting passengers than is possible on a surface road, be and the same hereby is and are authorized and empowered to construct, maintain and operate, within the limits of the territory in which such company or companies is and are authorized by law to construct, maintain and operate surface roads, one or more elevated railroads, with necessary stations and stairways, over the streets or highways in such city or cities, town or towns, township or townships; provided, that the cars on such elevated road or roads shall be propelled by means of a wire rope or cable, to be put and kept in motion by stationary steam power, located at such convenient point or points as may be necessary for the purpose, beyond the limits of any street or public highway, and not be locomotive steam engines; and provided, further, that such manner, in regard to elevation above the street or highway over which they are to be constructed, as not to interfere with the use of any public sewer, water pipe or any other public work, nor with ordinary public travel thereon, except to such extent as may be inavoidable in car-

rying out the provisions of this act; and provided, further, that no elevated railroad shall be constructed over any street or highway unless the consent, in writing, of the owners of at least one-half of the property fronting on such street, the owner or owners of which have not given their consent, be first ascertained and paid in the manner hereinbefore provided; and provided, also, that the consent of the municipal authorities of the city, town or township, in which such road is proposed to be built, be first had and obtained."

The foregoing statute authorized the erection of the elevated railroad structure which was the subject of *Lorentz* v. *Public Service Ry. Co.*, 103 N. J. L. 104, 135 Atl. 818.

> "The building of such a structure was authorized by a statute of 1887 subject to certain conditions precedent, the performance of which was not drawn in question * * * the structure was there lawfully under the permission of the municipal authorities and the ordinance of Jersey City, was duly admitted in evidence."

Schedule II

Decisions defining the common law in New Jersey imposing liability upon a Municipal corporation for active wrongdoing in the performance of a governmental duty which is authorized by statute.

1890—*Hart* v. *Union County*, 57 N. J. L. 90, 29 Atl. 490 (Supreme Court).

> Union County under a statute, P. L. 1889, page 58, enabling freeholders to improve and maintain public roads, made an excavation in the public highway.

"As the wrongful act charged was done in a highway thus disclosed to be within the scope of the powers conferred on this municipal corporation, its liability is thereby evinced."

1931—*Buffington* v. *Atlantic County*, 11 N. J. Misc. 443 (Circuit Court).

County under authority of N. J. R. S. 27:16-1 to 11, constructed a highway around a tree which was left in the highway. Complaint states cause of action.

"If the plaintiff could establish the fact that the county in construction and improvement of this road, so widened it as to include in the paved portion of the highway a large tree, and failed thereafter to provide travelers at night with a reasonable warning of the presence of the tree in that location, the county would be liable upon the charge of active wrongdoing and positive misfeasance such as comprehended by the exception to the rule exempting municipal corporations from liability."

1935—*Allas* v. *Rumson*, 115 N. J. L. 593, 181 Atl. 175, 102 A. L. R. 648 (Court of Errors and Appeals).

Under the authority of the statute authorizing municipalities to construct public buildings, N. J. R. S. 40:60-6, Rumson built a borough hall with an inclined ramp without a guard rail or protection (see brief, p. 10).

1936—*Hammond* v. *County of Monmouth*, 117 N. J. L. 11, 186 Atl. 452 (Supreme Court).

County under authority of New Jersey P. L. 1918, page 607, was repairing a culvert and left

an opening in the highway. County held liable to one injured.

"Thus notwithstanding that the legislature authorized the repair to this culvert, and that the only way the culvert could be repaired was by an excavation in the highway, nevertheless the failure of the county to provide adequate protection constituted active wrongdoing on its part."

1938—*Fisher* v. *Nutley*, 120 N. J. L. 290, 199 Atl. 40 (Court of Errors and Appeals).

Town placed an iron pipe within traveled street. Town was in control of its streets by N. J. R. S. 40:67-1. Judgment for plaintiff affirmed.

"In the present case the act of putting the pipe in the road was authorized but the manner was unauthorized, for the defendant was not authorized to place it there without warning or barriers" (p. 293).

1928—*Vickers* v. *Camden*, 122 N. J. L. 14, 3 Atl. 2nd 613.

Plaintiff injured because traffic lights, constructed by virtue of N. J. P. L. 1928, page 362, showed green for both highways.

"Operation of lights being a governmental function, in the absence of active wrongdoing, as here, there can be no recovery. * * * There is no testimony that the lights were improperly constructed."

1940—*Fredericks* v. *Dover*, 125 N. J. L. 288, 15 Atl. 2nd 784 (Court of Errors and Appeals).

Plaintiff recovered judgment for injuries sustained by falling on sewer cover. Town had statu-

tory authority to construct sewers under N. J. R. S. 40:63-1-7.

> "The law is well settled that any obstruction or erection in a public highway which interferes with the rights of a person lawfully passing thereon amounts to a common or public nuisance for which a municipality is charged with the responsibility if it was an active agent or instrument in the creation of the perilous condition."

1941—*Casta* v. *Newark*, 126 N. J. L. 375, 19 Atl. 2nd 629 (Supreme Court).

City excavated a portion of the roadway surface. Judgment for plaintiff affirmed. City had statutory control of streets under N. J. R. S. 40:67-1.

1941—*Lamb* v. *Camden*, 126 N. J. L. 448, 20 Atl. 2nd 348 (Supreme Court).

Plaintiff's judgment against city affirmed for injuries sustained by running into a traffic standard. Traffic standard erected under authority of N. J. P. L. 1927, page 477.

1941—*Newman* v. *Ocean Township*, 127 N. J. L. 287, 21 Atl. 2nd 841 (Court of Errors and Appeals).

Judgment for plaintiff who was injured by a curb which tipped as she was crossing street affirmed. Curb was erected under statutory authority of N. J. R. S. 40:56-1.

> "The evidence was such that the jury was justified in finding that the curbing—so constructed as to constitute a dangerous condition—was a misfeasance. For this an action lies against a municipality."

1941—*Jaixen* v. *Bloomfield*, 127 N. J. L. 370 (affirmed 128 N. J. L. 318), 22 Atl. 2nd 276 (app. 25 Atl. 2nd 879) (Supreme Court).

Judgment for plaintiff, a passenger in automobile, who was injured in crossing a valley gutter at street intersection affirmed. Town had statutory authority to construct gutter under N. J. R. S. 40:56-1.

"Thus it is clear that the testimony justified a finding that the valley gutter was reconstructed in 1936 or 1937; that its reconstruction was the act of the municipality; that it was negligence, affirmative in character, and in this situation a private action lies."

1942—*Reardon* v. *Wanaque*, 129 N. J. L. 18, 28 Atl. 2nd 54 (Supreme Court).

Judgment of non-suit reversed. Plaintiff was injured while curbing was being constructed by the W.P.A. Act of Borough was authorized by N. J. R. S. 40:67-1.

"If a duty under performance be imposed upon the municipality by statute or ordinance that duty may not be avoided by delegating the work to an independent contractor. Certainly a municipality has the duty of maintaining the public highway, and even though the independent contractor be performing the work without supervision nonetheless he is exercising the chartered power or privilege of the municipality. In this situation the municipality is answerable for his active wrongdoing."

1943—*Wright* v. *Newark*, 130 N. J. L. 239, 32 Atl. 2nd 543 (Supreme Court).

Judgment for plaintiff affirmed. City had excavated sidewalk. City was given authority over sidewalk by N. J. R. S. 40:180-1.

"We conclude that the proofs fully sustain the jury's finding that the nuisance was created by the city and was an act of active wrongdoing" (p. 241).

IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 827

ELEANOR G. MURPHY,
Petitioner.

against

THE CITY OF ASBURY PARK,
a Municipal Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the Circuit Court of Appeals is reported in 139 Fed. (2nd) 888, and is printed at pages 101-e to 101-i of the record.

The opinion of the District Court of New Jersey is reported in 49 Fed. Supp. 39, and is printed at pages 85-a to 98-2 of the record.

Statement

This case arose as the result of an accident which occurred January 20, 1940, at Asbury Park, a municipality in the County of Monmouth and State of New Jersey. The petitioner was a passenger in an automobile, riding in a

northerly direction along Ocean Avenue in Asbury Park. The automobile collided with the concrete base of a standard erected in the center of Ocean Avenue by the municipality. Ocean Avenue is a street which runs in a northerly and southerly direction, parallelling the boardwalk and the Atlantic Ocean. The accident occurred at the intersection of Ocean Avenue and Sixth Avenue. Sixth Avenue is a street which runs in an easterly and westerly direction, coming to a dead end at Ocean Avenue. Along the center of Ocean Avenue for substantially its length was erected a series of standards, the standard in question being one of the series. The standards had bell-shaped concrete bases, the bottom of which was 4′ in diameter and its height was 3½′. From the top of the base, a vertical metal column extended about 10′, at the top of which was an electric light fixture. Some of the poles had traffic lights attached to them. The particular standard identified with the collision did not, at the time. A sign was inlaid on its base, reading "Sixth Avenue," and the base had painted on it the words "No center parking."

The case was tried before the Honorable PHILIP FORMAN, District Court Judge, and a jury on May 19, 20, 25 and 26, 1942. At the end of the plaintiff's case, the defendant, the City of Asbury Park, moved for a non-suit and at the close of the case moved for a directed verdict upon the ground that the structure in question was one authorized by State statute and that the City was, therefore, not liable for any damages as the result of a collision with the same. These motions were denied by the Trial Judge and the jury returned a verdict in favor of the plaintiff. Upon appeal, the Circuit Court of Appeals for the Third Circuit reversed the judgment on the grounds that the facts in the case were such that they came directly within the facts and law as

stated by the New Jersey Court of Errors and Appeals in the case of *Lorentz* v. *Public Service Railway Co.*, 103 N. J. L. 104, 134 Atl. 818, and also that the facts came within the ruling in the case of *Delaware, Lackawanna & Western R. R. Co.* v. *Chiara*, 95 Fed. 2nd 663, which cases both held that a structure which would ordinarily be a nuisance may be legalized by statute.

The respondent, City of Asbury Park, relied upon two statutes of the State of New Jersey for its contention that the standards were legalized, and, therefore, the plaintiff could not recover. These statutes will be more fully discussed in the arguments to follow. It also relied upon two local ordinances based upon these statutes which provided for the erection of the standards and the payment for the same.

POINT I

The light standard erected in the middle of the street by the City pursuant to legislative authority and pursuant to an ordinance authorizing its construction was not a nuisance but was a device of which motorists using the street were bound to take notice and no action could lie as the result of a collision with the standard.

The proposition of law embodied in this point is that when a municipality, pursuant to legislative authority, erects a device such as the one in question, in a public street, such a construction is not a nuisance but on the contrary is a legalized obstruction of which the public must take notice. In such circumstances the municipality is not guilty of any act of wrongdoing but is deemed to have proceeded within the powers conferred upon it by the Legis-

lature. This is particularly true if the municipality has exercised its power pursuant to an ordinance as it did in the instant case, although the enactment of such an ordinance is not essential in order to render the municipality immune from liability.

In New Jersey the Legislature as early as 1917 granted such authority to municipalities. The so-called "Home Rule Act" (P. L. 1917, chapter 152, p. 410, Article XXIV, paragraph 1) as amended and included in the 1937 revision of the New Jersey statutes (R. S. 40:67-13) reads as follows:

> "40:67-13. Street lighting; lands, buildings, and equipment.
>
> "The governing body may by ordinance cause the streets, highways, parks and public places of the municipality to be lighted and erect and maintain on and in such streets, highways, parks and public places all proper poles, conduits, wires, pipes, fixtures and equipment and may acquire by purchase, condemnation or gift all necessary real estate and erect thereon all necessary buildings and equip the same with necessary equipment and machinery, all at public expense."

The 1917 act above was supplemental by a statute passed in 1923 (P. L. 1923, chapter 92, p. 178) which, with its amendments, is embodied in the revision of 1937 (R. S. 40:67-16), reading as follows:

> "40:67-16. Safety zones and other structures for traffic regulations; exceptions:
>
> "The governing body may establish safety zones, erect, construct and maintain platforms, commonly called 'safety isles'; standards commonly called 'silent policemen,' beacon light, guideposts and other structures which it may deem necessary for the

safety and convenience of persons and vehicles using the streets of such municipality, but no such erections or constructions shall be made, operated or maintained on any state highway without permission of the State Highway Commission; nor shall any such erections or constructions be made, operated or maintained on any county road or county boulevard without permission of the board or body having control of or jurisdiction over such county road or boulevard."

Further legislative authority for the construction of this standard is to be found in R. S. 40:56-1, subdivision J, which reads as follows:

"A local improvement is one, the cost of which, or a portion thereof, may be assessed upon the lands in the vicinity thereof benefited thereby.

"Any municipality may undertake any of the following works as a local improvement; and the governing body thereof may make, amend, repeal and enforce ordinances for carrying into effect all powers granted in this section;

"* * * The installation of such lighting standards, appliances and appurtenances as may be required for the brilliant illumination of the streets in those parts of the municipality where the governing body of the municipality may deem it necessary or proper to establish what is commonly called a 'white way.' "

This legislation found its source in chapter 152, Laws of New Jersey, 1917, Article XX, page 370.

There can be no question, therefore, that specific legislative authority for the erection of the standard in question by the City of Asbury Park is to be found in the three statutes in question and that this authority dates in the one case from the 1917 act and in the other from the 1923 law. An ordinance was enacted by the City of Asbury Park in

1921 which is Ordinance #335 (Record, pp. 74-a to 77-a), authorizing "bases for lamp standards in Ocean Avenue." In this connection it will be noted that the 1917 act hereinabove referred to authorized the municipality to proceed "by ordinance." The 1923 law did not require an ordinance. However, the municipality adopted one.

We have, then, two factors undeniably present; (a) specific legislation authorizing the construction. (b) an ordinance effectuating the grant of legislative authority. The decisions in New Jersey and in the Circuit Court of Appeals have held uniformly that where these two factors exist, the device erected pursuant to them cannot be deemed a nuisance. If it be an obstruction, it is a legalized obstruction of which the public is bound to take notice.

Being permanent in character, the municipality which created it cannot be held liable for an act of wrongdoing which has been held generally to consist of some act of a temporary nature as will be disclosed by an examination of the leading cases on the subject.

The case of *Lorentz* v. *Public Service Railway Co.*, 103 N. J. L. 104, 134 Atl. 818, a decision of the Court of Errors and Appeals of New Jersey, is practically dispositive of all the questions at issue in the instant case. An automobile collided with an elevated structure maintained by the defendant utility company on Central Avenue, Jersey City, New Jersey. It was shown that the structure was authorized by a New Jersey statute which contained a general authority to erect structures of that type. There was also an ordinance in Jersey City permitting its construction. Justice PARKER, speaking for the Court, said at page 818:

> "From what has been said, it should be sufficiently obvious that the structure in question was a lawful one, sanctioned by legislative and municipal author-

> ity. It is elementary, of course, that any unlawful obstruction of the highway is prima facie a nuisance, and that the party responsible for it is liable in damages to the one injured thereby. This was the theory of the leading case of *Durand* v. *Palmer*, 29 N. J. L. 544. But it is equally well settled that the legislature may legalize what would otherwise be a nuisance."

The petitioner in its brief in support of the petition for the writ of certiorari, at page 21, sets out in detail the language of the statute which the Court in the *Lorentz* case (*supra*) held authorized the erection of the elevated railroad structure which was the subject of that case. It is contended by the petitioner that this statute was specific in contradistinction to the statute involved in the instant case, maintaining that the statute authorizing the standards in question was not specific enough to come within the rules held by the state courts concerning legalized nuisances. However, a careful reading of this statute will disclose that it contains merely a general authority to erect structures of the type which was erected. It does *not* designate specifically the particular structure in Jersey City which the defendant erected. In other words, it is statutory authority of the same type as that under which the City of Asbury Park erected the standard in the instant case. It is applicable to all railway companies just as the statutes hereinabove set forth are applicable to all municipalities. It destroys the contention of the petitioner that there must be specific legislation applying to the particular structure in question in any given case in order that the structure, if it be deemed an obstruction, can be legalized.

Justice PARKER, in the *Lorentz* case (*supra*), said:

> "It is significant that neither in the trial court nor in this Court has the industry of counsel produced one decision in which recovery was had because of a

> collision with a legalized permanent obstruction in a highway, apart from some special misuse of such structure. Our own decisions on this phase are instructive as indicating the general rule by the exceptions to it. Thus, in *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, the ground of recovery was not the electric pole but some uninsulated wire left where the deceased could touch it."

Quoting *Matheke* v. *United States Express Co.,* 86 N. J. L. 586, 92 Atl. 399, with approval, Justice PARKER said:

> "Permanent encroachments upon the highway such as front door steps, hitching posts, awning poles, and this elevated railroad structure itself, are incidents of the highway of which the traveling public must take notice; but merely temporary obstructions to travel, such as an open area or coal chute, the piling up of building materials, a lowered arc light, or a sign or awning suspended so low as to impede travel, are matters as to which in the absence of knowledge or actual warning, the presumption is that no such obstructions to travel will be encountered."

The Court also quoted *W. B. Wood Co.* v. *Balsam,* 100 N. J. L. 275, 126 Atl. 480, with approval, as follows:

> "Those using the highway were obliged to take cognizance of this lawful construction and to govern themselves accordingly."

Finally the Court says:

> "It seems, therefore, clear and indeed is not denied that this elevated structure is a lawful structure erected pursuant to lawful public authority and essentially similar in characteristics to the elevated railroads in New York, Boston, Philadelphia, Chicago, and perhaps other large cities. Structures of this kind authorized by law and used to facilitate public travel, although they are physical obstruc-

> tions to drivers of ordinary vehicles and perhaps to pedestrians, are nevertheless not nuisances and the public must take notice of them.
>
> "The complaint counts, however, on the failure to light the columns so that they can more readily be seen at night, and the failure to clean them when they become dirty and dingy, but both these claims imply a duty and we find no such duty laid down in the statute or ordinance, and without some such requirement in one or the other, we are unable to say that any such duty existed. The right to erect and maintain the structure was conferred without any such qualification, and it seems reasonable to say that where neither the statute nor ordinance mentions the matter, it must be assumed that the ordinary public lighting of the street was considered sufficient in the premises."

Lorentz v. *Public Service Railway Co.* (*supra*), was followed and approved by the United States Circuit Court of Appeals for the Third Circuit in 1938 in *Delaware, Lackawanna & Western RR. Co.* v. *Chiara,* 95 Fed. 2nd, 663. A petition for certiorari was denied by the United States Supreme Court in 305 U. S., page 609. The facts and law involved in that case are almost identical with those in the instant case except for the fact that the defendant in the *Chiara* case was a railroad whose structure was authorized by statute and local ordinance, and in the instant case the defendant is a municipality whose structure was authorized by state statute. The Circuit Court of Appeals in its decision discussed practically all of the New Jersey cases involving legalized nuisances and concluded that the statute involved authorized the construction of a concrete chamber serving as a base of the central support of a railroad bridge erected and maintained by the defendant company. In applying each cited case, the Court looked for the presence

of legislative authority. Where it was found to be present, the Court held that the structure was not a nuisance and finally made the following pronouncement:

> "It follows, therefore, that the structure of the bridge, including the concrete chamber within the wagonway of Henderson Street, was lawful and that members of the public, including the appellees, were required to take notice of its presence and situation, and govern themselves accordingly.
>
> "In our opinion, the learned trial judge should have directed a verdict for the appellant as prayed for by it."

Surely it will be conceded that a municipality pursuant to legislative authority has power to erect a structure itself which it may authorize a private corporation to erect. Therefore, *Lorentz* v. *Public Service Railway Co.* (*supra*) and *Delaware, Lackawanna & Western RR. Co.* v. *Chiara* (*supra*) are undoubtedly authority for the proposition that the light standard in Asbury Park, erected pursuant to specific legislation and an ordinance adopted by the governing body of the municipality, was a lawful structure and that no action could lie as the result of a collision with it.

The principle enunciated in the two cases above discussed has long been recognized. In Dillon's "Municipal Corporations" (4th edition, vol. 2, p. 780) Professor Dillon says:

> "By virtue of its authority over public ways, the legislature may authorize acts to be done in and upon them or legalize obstructions therein which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that what-

> ever the legislature may constitutionally authorize to be done is, of course, lawful, and of such acts done pursuant to the authority given, it cannot be predicated that they are nuisances: If they were such without, they cease to be nuisances when having the sanction of a valid statute. As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the legislature as to the uses to which streets may be devoted * * *
>
> "The legislature, instead of exercising directly this authority as to the uses of streets and public places, may authorize it to be exercised by local or municipal authorities."

The discretion reposed in the municipal authorities in the construction of the devices above referred to is indicated by reference to *Swift* v. *Delaware, Lackawanna & Western RR. Co.*, 66 N. J. Eq. 34, 57 Atl. 456, in which Vice-Chancellor EMERY discussed the exercise of such municipal power based upon statutory sanction, and said:

> "The municipal authorities are thus by the express terms of the act made the judges of what changes are necessary in order to secure either of these objects, and in the absence of fraud, their judgment that the change is necessary is final."

A careful reading of all the New Jersey decisions on the subject will indicate as already stated that New Jersey courts have adhered to the principle and that wherever recovery has been permitted, it has been because the legislative sanction did not exist or was not applicable. The petitioner has listed, at page 22 *et seq.* of its brief, the decisions of the courts of New Jersey upon which it relies to support its contention as to the alleged conflict between such decisions and the decision of the Court below. It is

obvious that these cases do not conflict with the authorities cited by the Circuit Court of Appeals in its opinion in the instant case, 139 Fed. 2nd, 888, in that all cases cited by the petitioner were without legislative authority despite the fact that the petitioner has inserted citations of a statute which it maintains apply. A reading of these cases will prove that they are barren of legislative authority.

The petitioner relies strongly upon the case of *Allas* v. *Rumson*, 115 N. J. L. 593, 181 Atl. 175, in its discussion of the rule of active wrongdoing. In *Allas* v. *Rumson* (*supra*) the Borough of Rumson constructed a ramp on its private property leading to the Borough Hall. The ramp extended from the public highway along one side of the Borough Hall to the public offices maintained on that side of the building. The ramp had no guard rails and the plaintiff in the night fell from it into an areaway and was injured The opinion of the New Jersey Court of Errors and Appeals, speaking through Justice HEHER, grounded the liability of the municipality upon active wrongdoing in the construction of the ramp. It will be perceived upon reading the case that no question of legislative authority for the construction of the ramp arose. The question of legislative authority is not even discussed in the Court's opinion and the defendant Borough cited no legislative sanction for the construction of the ramp. The case turned upon the question whether a municipal corporation is responsible for negligence as compared with its liability for active wrongdoing or misfeasance. Justice HEHER said:

> "There is, of course, a well recognized distinction in respect of liability for negligence between the exercise of a governmental function or duty imposed upon the municipality by law for the benefit of the public and from the performance of which no profit

> or advantage is derived, and powers conferred for the accomplishment of corporate purposes essentially special or private in character, in respect of which the municipality stands upon the same footing as a private corporation."

Throughout the Opinion the Court distinguishes between active wrongdoing or misfeasance on the one hand and mere negligence or the failure to perform a duty on the other, saying:

> "The active wrongdoing must be chargeable to the municipality in order to render it liable,—that is where a municipality directs its employee to dig a hole in a public highway and leaves it unguarded or participates in some other act of misfeasance of its employee through which a person suffers injury."

There is nothing in the Opinion in *Allas* v. *Rumson* (*supra*), which overthrows or modifies in any way the principles laid down in the cases above cited. There is nothing in it which by any possible construction abrogates the rule that a municipality may erect a device on the highway with legislative authority.

The cases cited by the petitioner in its brief all present two features:

1. Absence of legislative authority for the construction of the device in question;
2. Active wrongdoing in the construction of the device in question.

When they are analyzed, it will be seen that they really represent an application of the rule or rather the distinction laid down in *Matheke* v. *United States Express Company* (*supra*), in which Mr. Justice GARRISON illustrated the distinction between permanent encroachments upon the

highway and "merely temporary obstructions to travel such as an open area or coal chute, the piling up of building material * * * are matters to which, in the presence of knowledge or actual warning, the presumption is that no such obstructions to travel will be encountered." In the *Allas* case and the other cases in which it was cited and followed, there was a complete absence of legislative authority for the structure or there was some act of a temporary nature constituting active wrongdoing or misfeasance.

The petitioner attempts to invoke the jurisdiction of this Honorable Court on the ground that there is an important question of local law probably in conflict with local decisions. We respectfully maintain that this is not so but that the Circuit Court of Appeals, in reversing the judgment of the District Court, followed the basic and settled law of the State of New Jersey in holding that the standard in question was a structure erected pursuant to legislative authority.

We respectfully submit that instead of the decision of the Court below being contrary to the statutes of the State of New Jersey and in conflict with the decisions of the courts of that State, it is in accord therewith and in full reliance thereon as its Opinion shows.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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